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IN THE

Supreme Court of the United States

October Term, 1982

ROBERT ARGENTO and JOSEPH SANSONE,

Petitioners,

v.

BENNIE LENARD,

Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Although petitioners are satisfied that their statement of the case reflects a sincere effort to accurately present in the limited space available to them both versions of the occurrence, and that this is borne out by a review of the trial transcript, some comment is necessary as to the accusations made by respondent in reference to this matter. Throughout this litigation the tone of respondent's briefs has been in the same strident vein as here, in charging that petitioners "seriously misrepresented" what the evidence consisted of in this case (see, e.g., p. 4 of Answer) and of trying to "sneak in the back door what they can't get in through the front . . ." (p. 19 of Answer). The evidence summarized in petitioners' statement of the case is essential to this Court's understanding of the basis for

this Petition. In contrast, respondent's statement of the case consists largely of a summary of only his version of the occurrence. It is frequently undocumented by references to the record and in some instances contains inaccurate statements of the evidence.[1] (pp. 21-22 of Answer). The respondent's recitation in detail of his testimony regarding his alleged beating was rejected by the jury, and the jury's findings in this regard were affirmed by both the District Court and the Court of Appeals. Since respondent chose not to file a Cross-Petition for a writ of

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[1] For example, at page 22 of respondent's Answer, it is stated that Officer Argento "prohibited Hennings from seeing his father," thereby attempting to cause this Court to believe that Lenard was being held incommunicado. The fact is that Hennings testified that Lt. Vertuno said that Hennings could not see his father at that particular moment because he was being processed and because a shift change was underway which prevented an officer from accompanying Hennings. (R.P. 1436).

certiorari, these findings are not subject to review by this Court. See, e.g., United States v. O'Brien, 391 U.S. 367 (1968).

ARGUMENT

I. THE COURT OF APPEALS SUSTAINED A FINDING OF A SECTION 1985(3) CONSPIRACY IN THE ABSENCE OF AN OVERT ACT IN FURTHERANCE OF THE ALLEGED CONSPIRACY

Respondent's attempted answer to petitioners' argument that the Court of Appeals did not find an overt act in furtherance of the alleged Section 1985(3) conspiracy does not confront the arguments presented by petitioners. The Answer consists in large part of quotations from the opinion below, and ignores the critical issue involved in this Petition, i.e., whether or not there was evidence of an overt act in furtherance of the alleged conspiracy.

Petitioners have never contended that the Court of Appeals did not correctly cite the law of civil conspiracy. Rather, it is

petitioners' contention that the Court of Appeals erroneously applied the law in this case and in so doing has in effect completely and incorrectly changed the burden of proof necessary to establish a civil conspiracy under Section 1985(3).

As this Court has construed Section 1985(3), the plaintiff must allege and prove four elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. [Emphasis added]. United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott, 51 U.S.L.W. 5173, 5174 (No. 82-486, July 5, 1983).

In contrast to the law of criminal conspiracy, pursuant to which the mere existence of an illegal agreement may provide

the basis for a finding of liability, Section 1985(3) expressly requires "overt acts necessary to consummate the conspiracy as an actionable wrong." Collins v. Hardyman, 341 U.S. 651, 659 (1951). Accord, Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569, 576 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976), wherein the Court of Appeals for the Seventh Circuit stated:

> 'The damage for which recovery may be had in a civil action is not the conspiracy itself but the injury to the plaintiff produced by specific overt acts . . . The charge of conspiracy in a civil action is merely the string whereby the plaintiff seeks to tie together those who, acting in concert, may be held responsible for any overt act or acts.' Rutkin v. Reinfeld, 229 F.2d 248, 252 (2d Cir. 1956), cert. denied, 352 U.S. 844, 77 S.Ct. 50, 1 L.Ed.2d 60 (1956).

Despite the jury's finding that petitioners did not beat the respondent as alleged, the Court of Appeals relied heavily on respondent's alleged physical

injuries as the basis for the affirmance of the jury's finding of a 1985(3) conspiracy. Nowhere is this more apparent than in the following statement from the Court of Appeals opinion:

> While the jury may have found insufficient evidence of a beating, that does not mean that there was insufficient evidence of a §1985(3) conspiracy. The jury could have found that there was insufficient evidence to tie all the defendants to the alleged beating, yet enough evidence based primarily upon the injuries sustained by Lenard during his police custody, to reasonably conclude that at least Argento and Sansone had entered into and committed 'an act' in the furtherance of a conspiracy to deny equal protection. [Emphasis added]. 699 F.2d at 883.

Although the Court of Appeals ultimately concluded that given the jury's finding in favor of all defendants on Count I it had been determined that respondent was not beaten as alleged, and that this jury verdict should not be disturbed, the Court persisted in relying on respondent's

physical injuries as evidence of an overt act committed in furtherance of the alleged conspiracy.

This analysis is based upon an absolute non sequitur. Having found that petitioners did not beat respondent, it defies common sense to conclude that respondent's physical injuries resulted from an overt act in furtherance of the alleged 1985(3) conspiracy. Respondent was very explicit at trial as to how he claimed his injuries occurred. He testified that Argento hit him in the eye with a nightstick and that he was beaten at the station by Argento, Zito and Culotta, and no one else. The jury concluded that none of these officers, including petitioner Argento, engaged in this alleged beating.

Even if, as respondent argues, Sections 1983 and 1985(3) constitute separate causes of action, this does not mean that in the context of a particular

case the two sections are necessarily unrelated. This Court has repeatedly held that Section 1985(3) creates no substantive rights in and of itself, but merely provides a remedy for the violation of certain designated rights. See, e.g., Great American Federal Savings and Loan Association v. Novotny, 442 U.S. 366, 372 (1979). In the instant case the right of respondent alleged to have been violated was the "equal protection of the laws, or of equal privileges and immunities under the laws." More specifically, the gist of respondent's claim under Section 1985(3) was that he was deprived of equal protection of the laws by virtue of a conspiracy by petitioners and the other two defendant police officers to beat him. This alleged beating was the subject of Count I of the complaint, under which all defendants were acquitted. It cannot, therefore, constitute the overt act required under

Section 1985(3).

With respect to petitioner Sansone, respondent cites the fact that Sansone "was present in the police station and participated with Argento in conversations about the case and in preparing reports." (p. 21 of Answer). This conduct on the part of Sansone cannot possibly be construed as an overt act in furtherance of the alleged conspiracy since it occurred after the injuries of which respondent complains (and of which Sansone was not even accused of perpetrating by anyone including respondent) were sustained in the process of effectuating his arrest and removal to the police station when he was intoxicated and combative as found by the jury and affirmed by the lower courts. There is no evidence that either Sansone or Argento agreed to or perpetrated any of the indignities or other acts as to which respondent or any other witness testified.

II. EVEN IF THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN A FINDING OF A SECTION 1985(3) CONSPIRACY, PETITIONERS CANNOT BE HELD LIABLE FOR RESPONDENT'S PHYSICAL INJURIES

Without waiver of the foregoing, petitioners reiterate as stated in their Petition that even if it is ruled that there was sufficient evidence to establish a conspiracy on the part of petitioners, and that the events occurring in the station, e.g., the alleged "Chicken George" episode or the alleged dousing with water, were undertaken in furtherance of this conspiracy[2], liability cannot be imposed upon petitioners for the physical injuries sustained by respondent.

Respondent's attempt to answer this point does nothing more than parrot the vague statements made by the Court of

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[2] Even though there is no evidence that either Argento or Sansone were involved in these alleged acts.

Appeals to the effect that respondent's physical injuries can be considered under the Section 1985(3) count. No attempt is made by respondent to answer the contention of petitioners that imposition of liability for respondent's physical injuries is wholly inconsistent with the basic principles of civil conspiracy as applied to this case. While it is certainly true that all conspirators need not participate in all acts to be held responsible for them, where the respondent himself has identified all of the alleged perpetrators and the jury finds them not guilty, imposing liability for these physical injuries on one or more of the alleged conspirators defies common sense. Nevertheless, the Court of Appeals has held that the alleged consequences of this "beating" that did not occur, i.e., respondent's physical injuries, can be considered by the jury in fixing damages

under a conspiracy theory. It is not surprising that respondent cannot justify this puzzling result when the law, logic and common sense demand the opposite result.

To permit in a retrial the introduction of the physical injuries sustained by respondent as against petitioners would be akin to a denial of their civil rights. Such a measure would, in effect, force them to be individual guarantors of a prisoner's safety, notwithstanding the prisoner's own behavior. We are mindful of the fact that it could be possible for officers after having made a lawful arrest to enter into a conspiracy to deprive a prisoner of his civil rights, but such is not the case here, as demonstrated by the trial record. Unfortunate things allegedly occurred in respondent's life after his arrest. The primary and significant one, i.e., his physical injuries,

have in effect been adjudicated to have been his own fault. It is perhaps unfortunate that the identity of those who may have perpetrated indignities other than the physical injuries have not been identified; however, if these actions occurred, they are not the fault of petitioners Sansone and Argento, but of persons unknown or the Village of Melrose Park. If, even in the face of what we present in Section I of this Petition, petitioners must stand trial for damages under Count II, it would be a gross injustice to have them saddled with evidence of serious injuries which they did not cause and with respect to which they have been adjudicated by a jury and two courts of not having liability by reason of the Count I verdict in their favor.

Further, such a result would be in direct contradiction of the law relating to civil conspiracy, since even a con-

spirator's liability, (which for the reasons recited on the preceding pages is not that of petitioners), can only be based upon "overt acts done pursuant to the conspiracy." Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corporation, 494 F. Supp. 1139, 1160 (D.Del. 1980).

While the record is absolutely devoid of evidence of any conspiracy in this case, had there been such a conspiracy it could only have occurred after respondent was brought into the station house. The Court of Appeals has found the arrest to be proper; the jury found there was no "beating" at the scene of the arrest nor during the entry to the station via the steps and the parking lot. The first possible opportunity for an alleged conspiracy to have been formed under these circumstances was in the station house. Yet according to the evidence presented by both respondent and petitioners, the eye and shoulder injuries

occurred before respondent was brought into the station itself, and all defendants were found not to have engaged in the acts alleged by respondent to have caused these injuries. Damage testimony must therefore be consistent with the jury's verdict on Count I and exclude these physical injuries. As the Court of Appeals for the Seventh Circuit stated in Hampton v. Hanrahan, 600 F.2d 600, 625 (7th Cir. 1979) rev'd in part on other grounds, 446 U.S. 754 (1980), a plaintiff who has established a conspiracy may recover only for "deprivation of those rights arising from the implementation of the conspiracy." [Emphasis added.]

The gross and obvious unfairness of including evidence of such physical injuries in a retrial is that despite the fact that it has already been adjudicated that petitioners are not liable for inflicting these injuries to the respon-

dent, it is probable that in assessing damages on retrial a jury would view this case as though they had. Jurors cannot be fair when they do not know the facts. After being told that the petitioners have been found guilty of a "conspiracy" to deprive respondent of his rights, the jurors are likely to assume the worst and return an inflated and wholly unwarranted award of damages.

In any retrial on damages, evidence of the physical injuries allegedly sustained by respondent must in law and in fairness to these individual petitioners not be permitted.

III. GRANTING THIS PETITION FOR WRIT OF CERTIOARI WOULD NOT BE PREMATURE AND WOULD EXPEDITE RESOLUTION OF THIS LITIGATION

Respondent contends that because the Court of Appeals remanded one count of this case for a retrial on damages the granting of this Petition would be premature. To

the contrary, this case is a particularly appropriate one for this Court to exercise its discretion to grant review.

As this Court has recognized, absence of a final judgment should not be a bar to review by this Court where the issue presented is "fundamental to the further conduct of the case." United States v. General Motor Corp., 323 U.S. 373, 377 (1945).

As set forth in their Petition, petitioners, who are young law officers of limited means, face the potential of grave prejudice if this case is allowed to proceed to a jury under the erroneous rule of law announced by the Court of Appeals. The mention of insurance by the Court of Appeals omits the fact that the insurer denies coverage for intentional acts, punitive damages, and for all judgments herein rendered.

Moreover, contrary to respondent's assertions, postponement of the grant of this Petition will not serve the interests of judicial economy. A retrial would be conducted without really knowing whether the physical injuries are admissible. The vague and illogical ruling of the Court below will undoubtedly result in numerous evidence disputes between the parties as to how a trial should be conducted in order to attempt to conform with the opinion of the Court of Appeals and yet preserve some semblance of fairness to the parties.

Most significantly, a retrial under the constraints imposed by the Court of Appeals will not resolve the issues involved in this Petition. Respondent's gratuitous suggestion that petitioners should proceed to a retrial and apparently then have the "loser" come to this Court completely ignores the importance of the legal issues presented in this Petition

not only to these petitioners but to all police officers. Respondent's inference that all that is involved here is the amount of damages for which petitioners may ultimately be held liable is completely erroneous. Respondent has the cart before the horse. Before any retrial the parties here have a compelling need to know what the law requires. Under the circumstances it can best come from this Court before any retrial.

We ask this Court to rule as requested in our Petition.

Respectfully submitted,

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